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Supreme Court, U. S.
FILED
DEC 14 1979
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT

OF

THE UNITED STATES

October Term, 1979

No._____

Supreme Court, U. S.
FILED
DEC 14 1979
MICHAEL RODAK, JR., CLERK

MILTON BROWN, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Petitioner Milton Brown through court appointed counsel, asks leave to file the attached Petitioner for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit without prepayment of costs and to proceed in forma pauperis pursuant to Rule 53.

The court below appointed counsel to represent petitioner as an indigent pursuant to 18 U.S.C. §3006A(d)(6).

DATED at Anchorage, Alaska this 10th day of December, 1979.

Douglas Pope

DOUGLAS POPE,
Counsel for Petitioner

IN THE SUPREME COURT

OF

THE UNITED STATES

October Term, 1979

No.

MILTON BROWN, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Counsel for Petitioner

Douglas Pope, Esq.
912 West Sixth Ave.
Anchorage, Alaska 99501

Robert H. Wagstaff, Esq.
Wagstaff & Middleton
912 West Sixth Ave.
Anchorage, Alaska 99501

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REASONS FOR GRANTING THE WRIT

Petitioner Milton Brown respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on September 21, 1979.

OPINION BELOW

The opinion of the Court of Appeals and the opinion of the District Court for the District of Alaska, appear in the appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on September 21, 1979. This Petition for Certiorari is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED FOR REVIEW

I. When trial counsel, without the knowledge of the accused, concurrently represents a key witness against the defendant on a matter directly bearing the bias of the witness, is the accused denied effective assistance of counsel?

II. When the government knowingly fails to advise the court of trial counsel's conflict of interest and effectively deprives the accused of effective cross-examination of a key witness, is the accused denied his right to confront the witnesses against him and his right to a fair trial?

III. Should a defendant ever be burdened with showing prejudice when raising a Sixth Amendment claim of ineffective assistance of counsel after demonstrating that trial counsel's concurrent representation of the defendant and a major witness against him directly affected the truth finding process?

IV. Should the harmless constitutional error rule ever be employed to deny relief when government action deprived the trial court and the defendant of knowledge that trial counsel was in a conflict of interest and deprived the petitioner of effective cross-examination of a key witness against him?

STATEMENT OF THE CASE

By amended indictment dated January 30, 1975, Petitioner was charged with possession, possession with intent to manufacture, and possession with intent to distribute controlled substances in violation of 21 U.S.C. 841(a)(1) and 21 U.S.C. 844(a) (marijuana, cocaine and herion). The charges flowed from a search of an Anchorage, Alaska residence in the fall of 1974. Petitioner retained Anchorage attorney Joseph Palmier to represent him shortly after the arrest. Prior to trial, Petitioner's attorney did not move to suppress the fruits of the search that led to his arrest, did not move to suppress alleged admissions to drug enforcement agent Edward Burke, did not file a trial memorandum, did not offer any jury instructions and did not review the evidence before trial.

At the trial Petitioner requested that his counsel allow him to testify but was advised not to do so. Evidence directed to the jury's attention by the government or through cross examination by Petitioner's attorney revealed that the residence searched was rented to Petitioner, but both during and after the period in which the property was rented there were several other individuals, both male and female, living in the residence. Petitioner was found in the doorway of an upstairs bedroom at the

time the search wherein items allegedly employed in the adulteration, manufacture, and distribution of controlled substances (heroin, cocaine and marijuana) were siezed. A fairly large sum of cash ($4,000.00) was found in a bedroom on the lower level of the residence. In addition, several personal effects and a thumbprint of the Petitioner were discovered in the upstairs bedroom, and personal effects of the other residents of the premises were discovered throughout the premises. Petitioner was advised of his constitutional rights pursuant to Miranda v. Arizona, 384 U.S. 436 (1966), and indicated that he understood his rights and desired to make no statement. Finally, special agent Edward Burke testified that petitioner stated twice that "the drugs or dope found in the house belonged to him (Brown) and not to the girls," (RT., Trial, pp. 339, 516), and that he did in fact sell heroin (RT., Trial, p. 370). Petitioner was convicted by the jury on all counts.

Six months after the trial, in response to a motion for a new trial, the government revealed for the first time that, during the period of time Petitioner was employing his trial counsel prior to and during the course of the trial, his attorney was also actively representing special agent Edward Burke, the only witness at the trial whose testimony directly implicated Petitioner with the drugs found during the search.

On September 12, 1974, Joseph Palmier had entered his appearance on behalf of defendant. On or about October 1, 1974, special agent Edward Burke contacted Joseph Palmier for the express purpose of retaining Palmier to represent Burke at an administrative hearing on allegations against Burke by the Drug Enforcement Agency. The disciplinary action against special agent Burke by the DEA eventually charged Burke with the following:

> (a) Association with known criminals, creating an improper relationship with sources of information and conduct prejudicial to the U. S. Government, U. S. Department of Justice, and the Drug Enforcement Administration;
>
> (b) Falsification of DEA reports and giving false information to law enforcement officers by acquiescence and omission of material fact during an official investigation;
>
> (c) Misuse of official position and failure to follow provisions of agent's manual.

(Record, p. 404), (emphasis supplied).

Special Agent Burke's job was in jeopardy. After consulting with G. Kent Edwards, U. S. Attorney, regarding the seriousness of the allegations against him and discussing who would be appropriate as an attorney, Burke retained Palmier.

Petitioner's counsel did not move to suppress the testimony of Burke prior to trial. (Petitioner's counsel did move to strike some of the statements of agent Burke after they had been revealed to the jury during the trial).

U. S. Attorney Edwards knew that Petitioner's counsel was representing special agent Burke in the disciplinary proceeding. Edwards was scheduled, prior to Petitioner's trial, to testify as a witness on special agent Burke's behalf in the disciplinary proceeding, and did in fact testify on behalf of special agent Burke at the proceeding. The trial of Petitioner commenced on February 10, 1975. The disciplinary hearing of special agent Burke commenced on February 25, 1975, and special agent Burke was, in fact, dismissed from the Drug Enforcement Agency on April 11, 1975. Neither Petitioner's counsel, nor the U. S. Attorney (Edwards) ever advised the trial court that a dual concurrent representation existed. The facts of the dual representation and the nature of the conflict were never explicitly discussed with Petitioner.

After the hearing on the motion to vacate the judgment in the instant action, the trial court found that a conflict of interest did in fact exist, that the court had never been advised of the conflict and that the dual representation and the conflict were never explicitly discussed with Petitioner. In addition the court found that the only prejudice, if any, existed with regard to the failure to cross-examine special agent Burke on the then pending disciplinary charges and that the cross-examination in any event would not have caused the court to exclude any of the testimony of agent Burke. Finally, the court concluded that Petitioner had failed to establish the requisite degree of prejudice flowing from the conflict.

The Court of Appeals affirmed, finding that substantial evidence existed to sustain the verdict and that Appellant had not carried his burden of establishing prejudice arising from the conflict. The Ninth Circuit also affirmed the trial court's ruling denying a hearing on the issue of whether the government's action had denied petitioner his right to confrontation and a fair trial.

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS, AND OTHER DECISIONS OF THIS COURT, AS TO THE PROPER APPLICATION OF HARMLESS ERROR STANDARDS WHEN REVIEWING A SIXTH AMENDMENT CLAIM OF INEFFECTIVE ASSISTANCE BASED UPON TRIAL COUNSEL'S UNDISCLOSED CONFLICT OF INTEREST.

There is an apparent disagreement among the Circuits with regard to the allocation of the burden and the requisite showing of prejudice when post conviction relief is sought to vacate a judgment because of a defense attorney's dual representation of a defendant and a key witness against him. It will be shown, however, that the correct analysis reveals that the cases in the Circuits placing the burden on persons seeking collateral relief to show prejudice emphasize knowledge of defendants at the time of conflict and the lack of government involvement. Nevertheless, apparent inconsistency among the circuits is noteworthy.

A. CIRCUIT DECISIONS SUPPORTING PETITIONER'S VIEW

Courts have frequently held that the existence of an ongoing relationship between an adverse witness and a lawyer creates a very real conflict of interest. These courts conclude that the existence of such a relationship, with the inherent tendency of counsel to inconclusively

cross-examine the witness-client, creates a very real conflict of interest and requires a mistrial if the conflict is disclosed, or a new trial, if the conflict was discovered only later. United States v. Jeffers, 520 F.2d 1256 (1975), cert. denied _____U.S._____, 96 S.Ct. 805 (1976); Castillo v. Estelle, 504 F.2d 1243 (5th Cir. 1974); Porter v. United States, 298 F.2d 461 (5th Cir. 1962); District of Columbia v. Scott, 214 F.2d 860 (D.C. Cir. 1954); United States v. DiCarlo, 575 F.2d 952, 957 (1st Cir. 1978); Stevens v. United States, 595 F.2d 1066, 1069 (5th Cir. 1979); United States v. LaVallee, 282 F.2d Sup. 968, 971 (Eastern District New York 1968).

These cases correctly point out that it takes no great imagination to detect the potential dangers that face an accused, such as here, when defended by an attorney who is also representing an important prosecution witness. Two signficant dangers are lurking Virgorous cross-examination might prejudice the witness-client's interest. That potential danger is glaring here. At Petitioner's trial, or at any hearings on pretrial motions that should have been filed, had counsel vigorously cross-examined special agent Burke with regard to any bias to testify favorably because his job was at stake, matters contrary to special agent Burke's best interest might have been revealed and, in addition, may have resulted in diminishing the possibility that the U.S. Attorney Edwards would testify on special agent Burke's behalf in the subsequent disciplinary action.

The second danger recognized is that the scope of the examination of the client-witness by the attorney may be restricted by the fact that the attorney has learned

confidential information about his client-witness which cannot be revealed. This potential danger is also glaring here. Special agent Burke was charged with, among other things, falsifying an investigative report and giving false information by omission of material facts during an official investigation. Petitioner's trial counsel had information regarding that allegation, but could not reveal any of that information because of the attorney-client relationship developed with special agent Burke.

In this situation the Courts noted above conclude that it is not possible to perceive the erosion of zeal which may ensue from divided loyalty. Castillo v. Estelle, supra, p. 1245; Stevens v. United States, supra, p. 1070. Whether trial counsel in fact gave weight to the interest of the witness-client cannot be established directly but can only be gained by inference from the circumstances. United States v. DiCarlo, supra, p.955.

These cases correctly distinquish between concurrent representation (and the need for a per se rule of ineffective assistance) as opposed to conflicts raising from former representation wherein a showing of prejudice is required. United States v. Jeffers, supra, p.1263-64; Stevens v. United States, supra, p.1069.

> A different rule governs in the former representation case, that is, where counsels relationship to a prosecution witness has come to an end prior to trial. The conflict of interest claim in this context must be predicated upon counsel's past attorney-client relationship with the witness, rather than upon a certain continuing professional involvement that would obviously exist if the relationship were still an on going one. In the concurrent

> representation case the conflicting loyalties and the consequent risk of prejudice are manifest; in the former representation case, on the other hand, the possibility of prejudice is far less likely. . .

Stevens v. United States, 453 F.Sup. 1202, 1209 (Md. Florida 1978).

The rulings referred to above are also consistent with the holdings of this Court that "the right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." Glasser v. United States, 315 U.S. 60, 75-76 (1942); Holloway v. Arkansas, 435 U.S. 475, 55 L.Ed. 426, 437 (1978). The conflict resulting from joint representation in Glasser and Holloway present opportunties for different dangers flowing from the conflict than from concurrent representation conflicts, however, the policy underlying those cases is equally applicable here. Where the silence of trial counsel and the government effectively deprived Petitioner and the trial court of the knowledge that a conflict existed (and the scope of that conflict) a rule requiring petitioner to show that a conflict of interest prejudiced him in some precise fashion will not be susceptible of intelligent, even handed application.

B. CASES APPEARING TO BE CONTRARY TO THE POSITION OF PETITIONER.

In the Second Circuit some specific instance of prejudice must be shown to exist before it can be said that a petitioner has been denied the effective assistance of counsel. See, United States v. Carrigan, 543 F.2d 1053, 1055 (2d Cir. 1976); Kaplan v. Bombard, 573 F.2d 708, 712 (2d Cir. 1978). Closer examination, however, often reveals

elements that do not exist here. For example, in Kaplan v. Bombard, a joint representation case, petitioner had discussed the conflict of interest with his attorney and was advised further of the conflicts dangers by the judge prior to trial. After petitioner asserted confidence in his attorney, the court ruled that the trial would proceed with the defendants free to bring other counsel into the case anytime they felt there was a conflict. Id., p.711.

In Miller v. United States, 564 F.2d 103 (1st Cir. 1977), the Court ruled that "a real conflict or specific instance of prejudice must be shown." Id., p.106 (emphasis supplied). A real conflict was demonstrated by Petitioner here.

In United States v. Kidding, 560 F.2d 1303 (7th Cir. 1977), cert. denied _____ U.S. _____, 98 S.Ct. 217 (1977), defendants sought reversal on direct appeal rather than collateral relief after trial counsel represented co-defendants at trial. Defendant was aware of the conflict, the Court advised the defendant of the dangers of a conflict, and with defendant's consent trial counsel advised the Court that he did not think the defenses would be conflicting, but if a conflict arose he "would immediately advise the defendant to get another attorney." Id., p.1310. Subsequently, trial counsel failed to cross-examine the witness and corroborating statements of other witnesses. The Court applied the harmless error standard in that instance, and based its judgment on the independent evidence. Id. It is noteworthy what the Court stressed:

> We think the Six Amendment rights of defendants are adequately safeguarded by imposing the duty of informing defendants of the potential dangers of multiple client representation initially on the attorneys, as officers of the court, and by admonishing the trial judge to be watchful for indicia of conflict during trial.

Id., p.1310

The Court below applied the standards enunciated in Cooper v. Fitzharris, 586 F.2d 1325 (9th Cir., en banc, 1978). After distinquishing cases where the Court felt that defense counsel "were prevented from discharging functions vital to effective representations of their clients" the Fitzharris Court concluded that prejudicial effect could be evaluated from the record with reasonable certainty. Id., 1332. Fitzharris involved citations regarding counsel's failure to object to the admission of fruits of the warrantless searches of appellant's person and home, failure to move to supress the statements made by appellant to police, failure to object to testimony regarding appellant's identification at the preindictment line-up, and failure to inform him of his rights to appeal. In applying the harmless error standard the Court noted that the victim had identified the defendant as the assailant, the victim's mother had identified the defendant as the assailant, and a third person identified appellant's picture from a photograph of the line-up and identified him at trial. These identifications remained positive "after a vigorous cross-examination." Id., p.1327.

> Accordingly, the reviewing Court can undertake with some confidence its relatively narrow task of assessing the likelihood that the error materially effected the deliberations of the jury.

Id., 1332

In the instant case the Court below relied upon this language in Cooper v. Fitzharris:

> When the claim of ineffective assistance of counsel rests upon specific acts and omissions of counsel at trial, as it does in this case, relief will be granted only if it appears that defendant was prejudiced by counsel's conduct.

Id., 1331. See, Memorandum of Decision.

The Court below further concluded that independent evidence led them to believe that the verdict could not have been affected. Memorandum of Decision, p.3. In doing so the Court effectively applied what is commonly known as the "overwhelming evidence of guilt" test. 1/

In Chapman v. California, 386 U.S. 18 (1967), this Court focused upon tainted evidence and did not weigh that against the untainted evidence in determining whether the error was harmless. Subsequently, in Harrington v. California, 395 U.S. 250 (1969), this Court considered the effect of a denial of a defendant's sixth amendment right of confrontation under the rule established in Bruton v. United States, 391 U.S. 123 (1968). This Court concluded that the direct evidence of guilt presented at Harrington's trial was so overwhelming that, unless the Court was to apply an automatic

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1/ As contrasted with the "cumulative evidence" test, rejected by this Court in Harrington v. California, 395 U.S. 250 (1969). There is no question in this case that special agent Burke's testimony that petitioner had acknowledged ownership of the controlled substances seized was the only testimony to that effect presented at trial, or ever revealed to all parties and the court.

reversal rule to constitutional violations, the error must be considered harmless. Id. Harrington, supra, p.254. In Chapman, the only evidence proving the defendant's guilt was circumstantial. Chapman, supra, 386 at 25. In Harrington, there was direct untainted evidence, including the defendant's own statements, which established the same facts as did the erroneously admitted confessions. Harrington, supra at 252-254. In the instant case the only direct evidence of possession or use of the controlled substances flowed from special agent Burke's testimony. Trial counsel's failure to make any pretrial motions delayed any potential discovery of Burke's problems. Effective cross-examination at trial certainly would have not only placed the issues of agent Burke's ability to tell the truth and his potential interest in preserving his chosen means of employment that was obviously in jeopardy squarely before the jury, it may well have revealed other information tending to discredit the government's case. The truth finding process was directly affected.

The dangers of utilizing the overwhelming evidence test at all are apparent here. In effect, the focus of the Court is on whether the jury reached a correct result. When the Court applies the overwhelming evidence test, the harmful effect of reading a "cold record" is magnified. The Court is unable to assess what the jury may have assigned to a particular piece of evidence; even with an apparent overwhelming of evidence of guilt, the error may have been a substantial factor in the jury's decision. The greater

harm in using this test is the usurpation of the jury's function. While the test may provide assurance to an appellate court that the defendant is guilty in fact, it does not assure that the defendant is guilty as a matter of law. Such a determination may only be made by a jury. Not only is there a significant risk that a defendant will be erroneously convicted under this test, but public confidence and the belief that every individual is entitled to a fair trial will be diminished. The test applied below erodes the presumption of innocence one step further than this court has allowed in the past.

The failure to deter prosectorial conduct is another unsatisfactory element of this test. That element is glaring here with the blatant disregard of the U.S. Attorney to the interest of the Court in assuring a free trial. Assuming that the prosecutor made a rational decision regarding his actions, only a more stringent standard of harmless error would minimize the posssibility of future actions by increasing the risk of reversal. In this instance, vigorous cross-examination of special agent Burke might have revealed a more than casual connection between the fact that Burke was in jeopardy of losing his job, was testifying favorably in this trial, and knew that the U.S. Attorney prosecuting this case would be testifying favorably on his behalf at the disciplinary proceedings against him.

The conflicts referred to above justify the grant of certiorari to hear a preview of the judgment below.

II. THE ACTION OF THE U.S. ATTORNEY IN DEPRIVING THE TRIAL COURT AND PETITIONER OF THE KNOWLEDGE THAT TRIAL COUNSEL HAD A CONFLICT OF INTEREST FLOWING FROM CONCURRENT REPRESENTATION OF A MAJOR WITNESS RAISES IMPORTANT CONSTITUTIONAL QUESTIONS REGARDING THE APPROPRIATE STANDARDS AND BURDENS IN ASSESSING THE SIXTH AMENDMENT RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL, EFFECTIVE CONFRONTATION AND THE RIGHT TO A FAIR TRIAL.

A. THE CONCURRENT REPRESENTATION OF A DEFENDANT AND A MAJOR WITNESS AGAINST HIM BY TRIAL COUNSEL, COMBINED WITH THE GOVERNMENT'S EXPRESS SILENCE, DEPRIVED A DEFENDANT OF HIS RIGHT TO EFFECTIVE CONFRONTATION OF OF THE WITNESS.

Petitioner's Sixth Amendment right to confrontation is embodied largely by the right to cross-examine adverse witnesses. Davis v. Alaska, 415 U.S. 308, 315-316 (1974). It contemplates a right to effective cross-examination, and if that right is denied, constitutional error exists without the need to show actual prejudice. Davis v. Alaska, supra; Skinner v. Cardwell, 564 F.2d 1381, 1388 (9th Cir. 1977). Exercise of this right is particularly crucial where the witness offers damaging identification or statement testimony, for absent any independent contrary evidence, a defendant must rely upon impeachment of the witness's credibility or by showing bias. United States v. Harvey, 547 F.2d 720, 723 (2nd Cir. 1976). If there is a possibility of bias, extensive cross-examination should be permitted:

> In our judgment, cross-examination is generally an even more effective factor in revealing truth than is the oath of a witness. While the slogan that cross-examination should be limited to the subject matter brought out by direct examination may be accepted as a generalization,

> cross-examination in the interest of substantial justice seeking to elicit relevant truths should not be narrowly curtailed.

United States v. Garrett, 542 F.2d 23, 26 (6th Cir. 1976).

* * *

> Cross-examination is the principle means by which the believability of a witness and the truth of his testimony is tested.

Davis v. Alaska, supra, 415 U.S. at 316.

It is commonly accepted that the jury is entitled to have placed before it a defense theory of bias and prejudice stemming from a witness' criminal charges which could still be pursued against him. United States v. Croucher, 532 F.2d 1042, 1046 (5th Cir. 1976); United States v. DeLeon, 498 F.2d 1327 (7th Cir. 1974). Special treatment is accorded evidence which is probative of a special motive to lie "for if believed it colors every bit of testimony given by the witness whose motives are bared." United States v. Harvey, 547 F.2d 720, 722 (2nd Cir. 1976).

A defendant, of course, does not have an unrestricted right to cross-examine adverse witnesses on any matter desired. Initially the cross-examination must be shown to be relevant. The determination of relevancy is within the discretion of the trial court. Skinner v. Cardwell, supra, p.564. Occasionally cases are cited for the proposition that it is not error to deny cross-examination on collateral matters bearing only on the credibility of the witness and not concerned with those matters about which the witness has testified on direct examination. See, United States v. Garrett, supra, p.26. However, notwithstanding the position of some that limitation of cross-examination

regarding credibility on a collateral matter is not a denial of effective cross-examination, it is clear that any action limiting cross-examination regarding bias is never a collateral matter. United States v. Garrett, supra, p.25; Davis v. Alaska, 415 U.S. at 318.

Some cases have applied harmless error in instances where the right of effective cross-examination was limited. Each and every of those cases, however, reveals that the jury had a substantial and significant opportunity to judge the credibility or possible bias of the witness. Cf., Skinner v. Cardwell, supra at 1389, "when the refused cross-examination relates to impeachment evidence, we look to see whether the jury had sufficient information to appraise the bias and motives of the witness;" United States v. Vasilios, 598 F.2d 387, 390 (5th Cir. 1979), "Allen was subjected to rigorous and effective cross-examination resulting in over one hundred and fifty pages of transcript. The jury was sufficiently apprised of other bases on which Allen's credibility was vulnerable to attack;" United States v. Summers, 598 F.2d 450, 463 (5th Cir. 1979), "the jury, in light of this argument and the testimony elicited during cross-examination, could infer that Harris received immunity in exchange for his testimony against appellant Summers."

Cases concluding that effective cross-examination was denied and ordering a new trial reveal the same logic. See, United States v. Croucher, 532 F.2d 1042, 1046 (5th Cir. 1976), "the issue of the nature of Kirkendall's relationship with both state and federal law enforcement officials, in connection with his participation in this case, was highly relevant to his credibility as a witness for the prosecution.

Given this fact, we conclude that the jury was entitled to have placed before it the defense of Kirkendall's bias and prejudices stemming from the criminal charges which could still be pursued against him;" United States v. Harvey, supra, p.723, "[W]e are not convinced that Mrs. Martin's testimony was an insignificant part of the case against appellant and therefore find that denial of the opportunity to raise a reasonable doubt as to the identification by showing possible bias was prejudicial to appellant's right to a fair trial."

The importance of cross-examination lies not only in what may be revealed directly regarding bias on behalf of the witness but also lies with the discovery of facts which might lead to the existence of further information or provide the defendant with a greater opportunity for rebuttal of the direct evidence in the case. It is especially important in cases where a witness or an accomplice may have substantial reasons to cooperate with the government that a defendant be permitted to search for an agreement between the government and the witness. United States v. Crumley, 545 F.2d 945, 949 (5th Cir. 1978). When the accused seeks to cross-examine the "star" government witness providing an essential link in the prosecution's case, the importance of full cross-examination to disclose possible bias is necessarily increased. United States v. Summers, at 460.

> Accordingly, while restrictions on the scope of cross-examination are within the sound discretion of the trial judge, this discretionary authority to limit cross-examination comes into play only after there has been permitted as a matter of right sufficient cross-examination to satisfy the Sixth Amendment.

Id. (emphasis supplied).

* * *

> Defense counsel should have been permitted to expose to the jury the facts from which jurors, as a sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness.

Davis v. Alaska, supra, 415 U.S. at 318.

B. THE CONDUCT OF PETITIONER'S TRIAL COUNSEL AND THE GOVERNMENT COMBINED TO DEPRIVE PETITIONER OF HIS RIGHT TO EFFECTIVE CROSS-EXAMINATION AND A FAIR TRIAL.

The trial court found that Petitioner's trial counsel had a conflict of interest flowing from a dual representation that Petitioner was unaware of. The court further found that cross-examination regarding the nature special agent Burke's disciplinary proceedings and the effect upon Burke's testimony would have been proper, and that the court had never been advised by trial counsel or the U.S. Attorney of the conflict prior to or during trial.

It has long been settled that in criminal prosecution the United States Attorney has a double burden: he has the obligation to prosecute the government's case zealously and the obligation to try the case fairly with due regard for the rights of the person accused. Berger v. United States, 295 U.S. 76, 88 (1935). In the instant case the court below stated that the prosecutor's silence was not appropriate. It is obvious that had the prosecutor appropriately met his obligation to try the case fairly with due regard for the rights of the petitioner by revealing to the court the conflict petitioner would have had an opportunity to request vigorous cross-examination on the subject or seek a new attorney who

was not compromised. It is important to remember that petitioner requested that his counsel allow him to testify and requested that counsel vigorously cross-examine special agent Burke. Petitioner subsequently testified that in both instances, trial counsel advised against it. It is also important to recall that the U.S. Attorney prosecuting the case was a major character witness for special agent Burke at the subsequent disciplinary proceeding and that special agent Burke was facing serious charges that could have led to subsequent criminal prosecution. It is not stretching the facts whatsoever to infer that special agent Burke may well have refused to respond regarding the disciplinary proceeding based upon his Fifth Amendment right to remain silent. Such an action would most certainly have called for a mistrial and discredited agent Burke's credibility before the jury. It would also most certainly have placed trial counsel in an even more glaring conflict, to-wit: he would have had not only the right but the obligation to rise and advise his client-witness not to answer the questions if he felt that they might tend to incriminate him, but at the same time he had the obligation to effectively cross-examine the adverse witness against his defendant-client. It is clear that the easiest way to avoid this uncomfortable possibility was to remain silent. It is difficult to imagine in this situation how any reviewing court can determine that this error was insubstantial. Clearly the jury did not have sufficient information to appraise the bias and motives of special agent Burke. Special agent Burke was the only witness who testified regarding Petitioner's alleged admissions acknowledging ownership of the drugs and the paraphernalia. It was clearly not an insignificant part

of the case against petitioner. The denial of the opportunity to raise a reasonable doubt as to that testimony with regard to all the charges by showing possible bias was prejudicial to petitioner's right to a fair trial. United States v. Harvey, supra, pp.723-724.

CONCLUSION

For all the reasons stated above, a writ of certiorari should issue to the review of the judgment and opinion from the Ninth Circuit.

RESPECTFULLY SUBMITTED this 10th day of December, 1979.

DOUGLAS POPE

By: Douglas Pope

WAGSTAFF & MIDDLETON

By: Robert H. Wagstaff

FILED

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ERIC E. MELFI, JR. CLERK
U. S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MILTON JOSEPH BROWN, Petitioner-Appellant, vs. UNITED STATES OF AMERICA, Respondent-Appellee.	)	Nos. 78-2557 78-2558 MEMORANDUM

Appeal from the United States District Court for the District of Alaska

Before: CHAMBERS and TANG, Circuit Judges, and THOMPSON,* District Judge.

Appellant was convicted of violation of the narcotics laws in 1975, and after his conviction was affirmed by this Court, he filed a motion to vacate sentence under 28 U.S.C. §2255. The appeal in No. 78-2558 is from the final order of the district court denying relief under that Section. The appeal in No. 78-2557 is from an earlier nonappealable order and must be and is dismissed. The issue sought to be raised therein, however, is properly considered in the appeal from the final order.

Appellant contends that the attorney who represented him at his trial was simultaneously representing a Drug Enforcement Administration agent who would testify against him. Administrative proceedings had been initiated against the agent before the trial commenced; they resulted in his eventual dismissal from the DEA. At the trial (which was some weeks before his dismissal) the agent testified that he was present with several other officers when appellant was arrested and, while other agents were conducting a search of appellant's home, appellant told him that the narcotics which had been discovered in appellant's bedroom were his. At the trial, the agent was cross-examined, but not extensively. (Indeed, the examination and cross-examination of the agent comprise less than 20 pages in over 700 pages of reporter's transcript.)

Appellant argues that the cross-examination of the agent was restrained as a result of his attorney's dual representation and, as a result, the agent was not sufficiently questioned as to his bias in favor of the government. He proceeds on the assumption that the agent would have been disposed to have an even greater bias in favor of the government than he would have in normal circumstances, because he would be interested in protecting his governmental job, which was in jeopardy. Appellant characterizes the situation as representing a denial of effective assistance of counsel under the Sixth Amendment.

The test that is applied in this circuit, where there is a claim of ineffective counsel, is whether there was "reasonably effective and competent defense representation." Cooper v. Fitzharris, 586 F.2d 1325, 1329 (9th Cir. 1978). The district judge, in reviewing the record of the trial and of the evidentiary hearing, and in considering the testimony given at both, concluded that the evidence against appellant was "overwhelming even totally disregarding [the agent's] testimony." Moreover, he noted that appellant had "never contended that the statements given to [the agent] were involuntary."

In Cooper v. Fitzharris, supra, this Court held that:

> "When the claim of ineffective assistance of counsel rests upon specific acts and omissions of counsel at trial, as it does in this case, relief will be granted only if it appears that the defendant was prejudiced by counsel's conduct." 586 F.2d at 1331.

*The Honorable Bruce R. Thompson, United States District Judge for the District of Nevada, sitting by designation.

The district judge concluded that the effect of any additional evidence as to the agent's pro-government bias,

> " . . . was so remote and negligible when compared to the direct evidence against Petitioner that the court cannot conceive of the possibility that the verdict would have been any different had such evidence been presented."

Our review of the record leads to the same conclusion. Even if we begin, as did the district judge, with an assumption that there was a conflict of interest, we find that appellant has not carried his burden of establishing prejudice arising from counsel's failure to cross-examine the agent further.

Other issues, including that originally raised in No. 78-2557, are all related directly to the issue of the conflict of interest and the prosecutor's knowledge of it. This, it is argued, constituted a denial of fair trial. But all of these issues are without merit. As there was no prejudice arising from any conflict of interest, there can be no merit to an argument that the prosecutor did not disclose his knowledge of that conflict of interest.*

The appeal sought to be taken as No. 78-2557 is dismissed. The order appealed from in No. 78-2558 is affirmed.

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*This is not to say that the prosecutor's silence was appropriate. The motion attacking the conviction and the appeals to this Court might have been avoided (or simplified) if the trial judge had been informed of the situation, thus giving him the opportunity to address the problem during the trial.

FILED
JUN 5 1978
UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA
By _____ Deputy

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,
Plaintiff,
v.
MILTON BROWN,
Defendant.

No. A74-159 Cr.

MEMORANDUM AND ORDER

THIS CAUSE comes before the court following an evidentiary hearing on petitioner's motion to vacate judgment pursuant to 28 U.S.C. §2255. By this court's order of November 23, 1977, three issues were outlined for development at the evidentiary hearing. The court will consider each of these issues.

The first issue is whether petitioner's trial counsel had a conflict of interests. The court concludes that a conflict of interests did exist. Counsel was simultaneously representing petitioner and in an unrelated matter one of the witnesses against petitioner. As is developed below in the discussion of prejudice this conflict was not severe but it was, nonetheless, a conflict.

The second issue is whether cross examination under the rule of U. S. v. Miles, 480 F.2d 1215 (2d Cir. 1973) would have been proper in this case. The court concludes that such cross-examination into agent Burke's disciplinary proceedings would have been proper. As is developed below in the discussion of prejudice, this cross-examination most certainly would not have altered the outcome of the trial but if presented it would have been properly allowed.

The final issue is the question of prejudice. This discussion involves two issues. The first is whether defendant was prejudiced by the conflict. The second is whether a showing of prejudice is necessary.

The essence of the petition is that counsel's conflict of interest caused him to forego cross-examination of agent Burke on the then pending disciplinary charges. No other allegations or intimations of prejudice exist in this case. Upon a review of the evidence the court concludes that defendant suffered no prejudice.

As the judge who presided over the original trial in this case and upon reviewing the transcript and evidence presented at the hearing the court concludes that the evidence against petitioner was overwhelming even totally disregarding agent Burke's testimony. In this case, however, the court is not asked to strike that testimony but rather is asked to consider the effect of the cross-examination on bias. This cross-examination would not have caused the court to exclude any of the statements made by petitioner to agent Burke and it is worthy of note that petitioner has never contended that the statements given to agent Burke were involuntary. If trial counsel had pursued all possible evidence the jury would have heard the overwhelming presentation against petitioner and the additional evidence of bias

This evidence of bias was so remote and negligible when compared to the direct evidence against petitioner that the court cannot conceive of the possibility that the verdict would have been any different had such evidence been presented.

The next issue is the necessity of showing prejudice. Petitioner vigorously asserts that no such showing is necessary. For his position he cites several cases. Those cases, however, are all distinguishable in a material respect.

Holloway v. Arkansas, ____ U. S. ____, 46 U.S.L.W. 4289 (1978), involved counsel's dual representation of co-defendants where a conflict existed. The Supreme Court concluded that a showing of prejudice in that case was unnecessary. In discussing the rationale for not requiring a showing of prejudice the court emphasized that in a multiple defendant situation the conflict might prevent counsel from pursuing various courses of conduct both at trial and pretrial in such matters as plea negotiations. Id at _____, 46 U.S.L.W. at 4293. That rationale does not apply to this case. The conflict which existed in this matter does not taint all of counsel's trial preparation opinions, and tactics. It is not subtle nor immeasurable nor does it require "unguided speculation." The conflict herein involved at most one specific failure on cross-examination. The court does not consider Holloway to be authoritative nor persuasive in the context of the present case.

In Castillo v. Estelle, 504 F.2d 1243 (5th Cir. 1974) the court was faced with a conflict wherein trial counsel also represented a principle witness for the prosecution who was the victim of the offense for which defendant was charged. In determining that prejudice need not be shown the court considered the subtle nature of the potential prejudice. Id

1245. The conflict in that case was real and substantial. The court does not consider the present case to present a conflict which is as gross as that in Castillo, nor are the difficulties as subtle.

Porter v. United States, 298 F.2d 461 (5th Cir. 1962), presented a situation in which trial counsel simultaneously represented the defendant and the witness who was crucial in establishing defendant's entrapment defense. It is obvious that the conflict in that case involved a witness who was of substantial importance to the case. That is not true in the present situation.

A similar situation involving a critical witness is presented in Taylor v. United States, 226 F.2d 337 (D. C. Cir. 1955)[Duel representation involving informer who sold narcotics to defendant which resulted in the conviction under attack]; see Taylor v. U. S. 164 F. Supp. 764; See also Tucker v. U.S., 235 F.2d 238 (9th Cir. 1956).

A case from the D. C. Circuit, however, establishes that the court should not stop at the point it determines there is a conflict. Rather the nature of the conflict must be looked into. In District of Columbia v. Scott, 214 F.2d 860 (D. C. Cir. 1953), The court affirmed the lower courts reversal of a conviction when trial counsel simultaneously represented the government's principle witness. See Scott v. District of Columbia, 99 A.2d 641, 642-43. In the opinion affirming the reversal the court stated:

> Each case of this sort must be judged on its own merits. The decision here certainly should not be taken as a holding that a defendant can escape justice merely by hiring a lawyer who represents, in another case, a witness against that defendant. It means

> that under all the circumstances of this case... .

Thic court agrees with that statement by the D. C. Circuit and in the present case the nature of the conflict has not created any prejudice.

Two final matters remain. At the hearing in this matter petitioner renewed his request to call Mr. Edwards as a witness. As the court previously had ruled that Mr. Edwards' testimony on his own knowledge of the conflict would be cumulative at best the only other possible purpose for calling him would relate to Mr. Brown's knowledge of the conflict. As the court does not consider petitioner's knowledge to be an important factor in the resolution of this case there is no point in reopening the hearing to call Mr. Edwards.[1]

As a final matter the court grants petitioner's motion to proceed in forma pauperis, Rule 24(a), Fed. R. App. Pro., and denies petitioner's motion for appointment of counsel. This matter should be submitted to the Circuit Court.

Accordingly IT IS ORDERED:

1. THAT petitioner's motion to vacate judgment is denied. The clerk may enter an appropriate judgment.

2. THAT petitioner's motion for leave to appeal in forma pauperis is granted. While the court expresses certain doubts about the appealability of the order of May 3, 1978, this order relates to the appeal taken from that order and any appeal from the final disposition of this matter.

3. THAT petitioner's motion for appointment of counsel on appeal is denied.

DATED at Anchorage, Alaska, this 6th day of June, 1978.

James A. von der Heydt
United States District Judge

cc: U. S. Attorney
Douglas Pope

FOOTNOTES

1. The court notes that while trial counsel stated emphatically that petitioner knew of the dual representation it is undisputed that this fact and the potential conflict were not explicitly discussed with petitioner.

No. 79-5790

Supreme Court, U.S.
FILED
MAR 6 1980
MICHAEL RODAK, JR., CLERK

MAR 14 PAGE 11

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

MILTON BROWN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

DEBORAH WATSON
Attorney
Department of Justice
Washington, D.C. 20530

IN THE SUPREME COURT OF THE UNITED STATES

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ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The memorandum opinion of the court of appeals (Pet. App. 1-3) is not reported. The memorandum and order of the district court (Pet. App. 4-9) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on September 21, 1979. The petition for a writ of certiorari was filed on December 14, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner was denied the effective assistance of counsel because he was represented at trial by an attorney who simultaneously represented a government witness in a disciplinary hearing before the Drug Enforcement Agency.

STATEMENT

a. Following a jury trial in the United States District Court for the District of Alaska, petitioner was convicted on six counts of possessing, manufacturing, and possessing with intent to manufacture and distribute controlled substances, in violation of 21 U.S.C. 841(a)(1) and 844(a). He was sentenced to 15 years' imprisonment on each of counts one through five, and to one year's imprisonment on count six. The sentences on counts one through three were consecutive to each other, and those on counts four through six concurrent with each other and with the other sentences. In addition, petitioner was sentenced to concurrent special parole terms of three years on counts one through five.[1/]

The uncontested evidence at trial showed that on the evening of August 29, 2974, DEA agents and officers of the Anchorage Police Department searched petitioner's house in Anchorage, Alaska, pursuant to a federal search warrant (Tr. 10-11). In petitioner's bedroom they found large quantities of heroin and cocaine, a small amount of marijuana, and various items that constituted a veritable assembly line for the manufacture and packaging of heroin and cocaine (Tr. 17-247). Some of these items were hidden under the bed, in dresser drawers, and inside a travel bag; other items were located in plain view on a nightstand (Tr. 17-58, 62-71, 77-90, 94, 118-134). DEA Agent Edward Burke testified that during the search petitioner told him that the drugs found in the house belonged to petitioner and not to the three girls who were also present in the house at the time the search warrant was executed (Tr. 12, 339). In addition agents Burke and Daniel O'Brien testified that while he was being taken to the

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1/ Following the affirmance of his conviction on appeal, petitioner moved for a reduction of sentence pursuant to Rule 35, Fed. R. Crim. P. (R. 180-182). The district court granted the motion, reducing the 15-year sentence on count 3 from a consecutive to a concurrent term of imprisonment (R. 206-207).

police station, petitioner told them that he was a drug addict and dealt in heroin but that since he had gotten himself into this predicament he did not want to "snitch" on his source (Tr. 352-370).

In August 1975, after his conviction and the filing of a notice of appeal (R. 112), petitioner moved the district court for a new trial on the basis of newly discovered evidence concerning the credibility of Agent Burke. He also moved the court of appeals to remand the case to the district court for a hearing (R. 134-138). These motions were denied, and in April 1976 the court of appeals affirmed petitioner's conviction (R. 177-178).

b. Petitioner thereafter moved to vacate his sentence under 28 U.S.C. 2255, claiming that he had been denied the effective assistance of counsel because his trial attorney, Joseph Palmier, had also simultaneously represented Agent Burke in a DEA disciplinary action (R. 209). After initially denying petitioner's motion to vacate judgment (R. 231-232), the district court granted his motion for reconsideration and scheduled an evidentiary hearing to determine (1) whether trial counsel had a conflict of interest; (2) whether cross-examination of Agent Burke as to the disciplinary proceedings against him would have been proper at trial; and (3) whether, if a conflict of interest did exist, such conflict prejudiced petitioner (R. 295-296).[2/]

2/ In an amended motion to vacate judgment filed March 20, 1978, petitioner further claimed that the prosecuting attorney was aware of the conflict of interest before trial, yet failed to inform either petitioner or the trial judge of such conflict (R. 402, 421-424). The district court denied petitioner's amended motion to vacate judgment, stating that petitioner's original motion adequately covered the conflict-of-interest issue, and that petitioner's allegations concerning the prosecutor's knowledge of the conflict were at best cumulative (R. 629-531). Petitioner appealed this ruling. The court of appeals dismissed the appeal, but nonetheless addressed the issue of alleged prosecutorial misconduct in its order affirming the district court's denial of petitioner's original motion to vacate judgment (Pet. App. 1-3).

Facts stipulated during the evidentiary hearing showed that after being retained by petitioner in September 1974 to represent petitioner in the criminal proceedings against him, attorney Palmier in December 1974 agreed to represent Agent Burke in a disciplinary action brought against Burke by the Drug Enforcement Administration. The action charged Burke with associating with known criminals, creating an improper relationship with sources of information, conduct prejudicial to the government, falsification of DEA reports and misuse of his official position. At petitioner's trial, Palmier did not cross-examine Burke about the disciplinary action (R. 404-405, 522).

c. The district judge, the same judge who had tried the case, denied petitioner's motion to vacate judgment, finding that although petitioner's trial counsel had a conflict of interest, and although cross-examination concerning Agent Burke's disciplinary proceedings would have been proper, petitioner suffered no prejudice as a result of the conflict (Pet. App. 4-8). The court of appeals affirmed (Pet. App. 1-3).

ARGUMENT

1. Petitioner claims (Pet. 6-19) that his attorney, in representing Burke in the DEA's disciplinary proceedings at the same time he was representing petitioner in this case, involved himself in a conflict of interest that denied petitioner the effective assistance of counsel, since it may have caused the attorney to forego a more probing cross-examination of Burke. Although we believe that this dual representation was very ill-advised, we do not believe that, on the facts of this case, it constituted reversible error.

In Holloway v. Arkansas, 435 U.S. 475 (1978), this Court held that whenever a trial court, over timely objection, improperly requires joint representation of defendants with conflicting interests, reversal is automatic, and is not dependent upon a

showing of specific prejudice. The Court declined to apply a harmless error rule, stating (435 U.S. at 490-491) (citations omitted):

> In the normal case where a harmless-error rule is applied, the error occurs at trial and its scope is readily identifiable. Accordingly, the reviewing court can undertake with some confidence its relatively narrow task of assessing the likelihood that the error materially affected the deliberations of the jury. But in a case of joint representation of conflicting interests the evil * * * is in what the advocate finds himself compelled to refrain from doing, not only at trial but also as to possible pretrial plea negotiations and in the sentencing process. * * * And to assess the impact of a conflict of interests on the attorney's options, tactics, and decisions in plea negotiations would be virtually impossible. Thus, an inquiry into a claim of harmless error * * * would require, unlike most cases, unguided speculation.

In contrast to the joint representation in the same case of parties with conflicting interests, however, the fact that the government witness was represented by petitioner's counsel in a substantially unrelated civil proceeding created no realistic possibility of adverse influence on the attorney's presentation of petitioner's overall defense -- a point petitioner does not appear to dispute. At most, this circumstance might have affected the manner in which counsel conducted his cross-examination of Agent Burke. Assuming arguendo that the failure of petitioner's attorney to inquire on cross-examination into the disciplinary proceedings pending against Burke sprang from constraints imposed by the attorney-client relationship, an inquiry into the prejudicial impact of his failure to impeach Burke's credibility does not require "unguided speculation." Rather, both the scope and the impact of such curtailment are readily identifiable, and "the

reviewing court can undertake with some confidence its relatively narrow task of assessing the likelihood that the error materially affected the deliberations of the jury" (ibid.). Both courts below undertook this assessment, and agreed that the dual representation could not have prejudicially affected petitioner. We submit that their conclusion was correct.

Completely discounting Burke's testimony, the remaining evidence against petitioner was overwhelming. It showed that large quantities of heroin and cocaine, as well as numerous items for the manufacture and packaging of those drugs, were seized from a bedroom in petitioner's house[3/] during the execution of a search warrant. Some of these items were hidden in the bedroom in various locations; others were in plain sight. When the DEA agents and the Anchorage Police arrived to execute the search warrant, they saw petitioner, dressed in a bathrobe, come out of this bedroom; no one else was in the bedroom at the time (Tr. 299-301, 410, 612-614, 627-628). Inside the bedroom, the officers found clothing and personal papers belonging to petitioner (Tr. 151, 316). In addition, jewelry that petitioner claimed belonged to him was found in the same dresser drawers from which the officers seized approximately 60 balloons and 14 slips of paper, each containing heroin (Tr. 77-90, 316-319). Petitioner's fingerprints were found on some additional slips of paper containing heroin, found inside a travel bag in the bedroom (Tr. 139-143, 451-453). Also, a balloon containing heroin was found inside the pockets of a pair of pants that were hanging on the bedpost, and into which petitioner changed prior to accompanying the officers to the police station (Tr. 320-322, 387, 547-548). Before leaving for the police station, petitioner told DEA Agent Daniel O'Brien that he saw that O'Brien knew what was going on (Tr. 355). Finally, en route to the police station, petitioner admitted to O'Brien that he was a drug

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3/ Petitioner rented the house and personally paid the rent each month in cash (Tr. 276, 286-287).

addict, and that he dealt in heroin, but only with persons who were already addicted (Tr. 365, 370). According to O'Brien's account, when petitioner was asked if he wished to cooperate, he replied that he had gotten himself into the instant predicament, and did not want to implicate his source (Tr. 307-369).

In light of this compelling independent evidence of petitioner's guilt, it can safely be said that the failure of petitioner's attorney to cross-examine Burke about the disciplinary proceedings against him was harmless beyond a reasonable doubt. As both courts below observed (Pet. App. 3, 6), the effect on the verdict of any additional evidence concerning the agent's credibility "was so remote and negligible when compared to the direct evidence against petitioner that the court cannot conceive of the possibility that the verdict would have been any different had such evidence been presented."

Petitioner nonetheless claims (Pet. 6-14) that a conflict exists among the circuits as to whether a defendant whose attorney is also representing a government witness must show prejudice in order to establish the ineffective assistance of counsel.

Although there is some variation in the formulation of the proper standard for evaluating claims of ineffective assistance of counsel in this situation, it is far from clear that there is any substantial difference in the standard as it is actually applied. The First Circuit distinguishes between cases of joint representation of co-defendants, where the attorney is "particularly susceptible to disabling conflicts," and cases of dual representation, where an attorney presently has, or in the past has had, a legal relationship with a hostile party or witness, and in which the danger of conflicts is not as great. In the case of joint representation of co-defendants the court requires

only a relatively slight showing of actual prejudice; in the case of dual representation, however, "a real conflict of interest or a specific instance of prejudice must be shown." United States v. DiCarlo, 575 F.2d 952, 957 (1st Cir. 1978). See also Miller v. United States, 564 F.2d 100, 106-107 (1st Cir. 1977). This standard thus contemplates that an attorney's dual representation of the defendant and a hostile government witness, in and of itself, will not always constitute a conflict of interest requiring reversal.[4/]

4/ The District of Columbia Circuit, like the First Circuit, has also indicated that dual representation will not by itself warrant automatic reversal of the defendant's conviction. As the court stated in District of Columbia v. Scott, 214 F.2d 860 (D.C. Cir. 1954).

> Each case of this sort must be judged on its own merits. The decision here certainly should not be taken as a holding that a defendant can escape justice merely by hiring a lawyer who represents, in another case, a witness against that defendant. It means that under all the circumstances of this case there was a failure of representation which deprived [the defendant] of a fair trial.

See also United States v. Carrigan, 543 F.2d 1053 (2d Cir. 1976); Kaplan v. Bombard, 573 F.2d 708 (2d Cir. 1978).

The Fifth Circuit, on the other hand, has made no distinction between dual and joint representation cases in assessing ineffective assistance of counsel claims. Thus, in cases involving dual representation, the court has simply adopted this Court's language in Holloway v. Arkansas, supra, and Glasser v. United States, 305 U.S. 60 (1942) -- cases that involved joint representation -- and held that once the defendant has demonstrated the existence of a real conflict of interest, he need not slow specific prejudice. But in every dual representation case in which that court has found a conflict requiring reversal of the defendant's conviction, not only has the client-witness been a crucial witness for the prosecution, but the conflict between the defendant's interests and those of the government witness has been flagrant. Because the conflict in these particular cases may well have adversely affected the attorney's entire representation of the defendant, the Fifth Circuit has declined to speculate as to the precise amount of prejudice suffered by the defendant, and has simply presumed the existence of reversible prejudice. See Stephens v. United States, 595 F.2d 1066 (5th Cir. 1979) (defendant's trial attorney also represented in related criminal charges defendant's co-indicate, the government's "star witness," whose plea agreement with the government depended on his testifying against defendant at trial); Castillo v. Estelle, 504 F.2d 1243 (5th Cir. 1974) (defendant's attorney simultaneously represented, in unrelated litigation, the victim of the offense for which the defendant was charged, and who was a principal witness for the prosecution); Porter v. United States, 298 F.2d 461 (5th Cir. 1962) (defendant's attorney also represented in separate proceedings a key government witness against defendant; to establish defense claim of entrapment, attorney would have had to implicate criminally the client-witness).

Here, by contrast, Agent Burke was not a crucial government witness; independent, overwhelming evidence established petitioner's guilt.[5/] Nor was the conflict of interest so flagrant as to infect the entire representation of petitioner by his attorney; only the cross-examination by petitioner's attorney of Agent Burke might have been affected. No court has required reversal of a defendant's conviction on such facts.

2. Petitioner further claims (Pet. 14, 19-21) that the prosecuting attorney's failure to inform the court before trial of the conflict constituted the denial of a fair trial. We agree that the prosecutor should have brought this situation to the court's attention if defense counsel did not do so and if the prosecutor believed petitioner had not consented to the representation in these circumstances. Absent prejudice, however, this omission does not warrant reversal of the conviction. See United States v. Agurs, 427 U.S. 97, 107-110 (1976).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. McCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

DEBORAH WATSON
Attorney

MARCH 1980

5/ That Burke was not a crucial government witness also distinguishes Davis v. Alaska, 415 U.S. 308, 310 (1974), which presumed prejudice from an order barring certain cross-examination of "a crucial witness for the prosecution."